Houston Attorneys Supporting Judge McLeod

April 4, 2019

Hon. Lina Hidalgo, Harris County Judge
Hon. Rodney Ellis, Precinct One Commissioner
Hon. Adrian Garcia, Precinct Two Commissioner
Hon. Steve Radack, Precinct Three Commissioner
Hon. R. Jack Cagle, Precinct Four Commissioner
1001 Preston Street
Houston, Texas 77002

Re: Efforts to Replace Hon. William "Bill" McLeod

Dear Judge Hidalgo and Honorable Commissioners:

As members of the Harris County Bar, we appreciate your hard work in fully and fairly evaluating the right of Hon. William "Bill" McLeod to continue serving as judge of Harris County Civil Court at Law No. 4. As part of your deliberations, we respectfully ask you to consider the following facts and legal authorities, many of which may be missing from other legal briefs you may have received. The laws described below support Judge McLeod's continued service.

1. Judge McLeod's actions were reasonable and understandable.

Most of this letter discusses and applies the relevant passages of the Texas Constitution. As a preliminary matter, however, we address a question that some commentators have asked: How might a judge land in the confusing gray area now facing Judge McLeod? The answer lies in the peculiar structure of the Texas Constitution, which has perplexed generations of famous jurists and legal scholars. The issue is not whether alleged "ignorance of the law" constitutes a legal "defense." Instead, the uniquely complex and sometimes contradictory nature of the Texas Constitution is among the relevant circumstances that should guide application of that constitution to the facts at hand.

In evaluating a potential Texas Supreme Court campaign, Judge McLeod likely turned to the most logical source: The Texas Code of Judicial Conduct, which is authored by the Supreme Court. *See* TEX. GOV'T CODE, Title 2, Sub. G, App'x B. The code sets out the "basic standards which should govern the conduct of all judges and [provides] guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct." TEX. CODE JUD. CONDUCT, Premable. Before so much as entertaining the concept of another campaign, Judge McLeod surely turned to the

code's detailed regulations governing political activity.[1] Upon doing so, he would have read that "[a] judge may continue to hold judicial office while being a candidate . . . for election to **any** judicial office." TEX. CODE JUD. CONDUCT, Canon 5(3) (emphasis added). In other words, a sitting judge's right to seek a justiceship is recognized by the same high court that Judge McLeod considered running for.

In fashioning the relevant Judicial Code of Conduct provisions, it appears that the Texas Supreme Court did not account for a little-known exception buried in one of the **491 amendments** to the Texas Constitution. That exception provides that some, but not all, judges must resign their benches to pursue campaigns for other "office[s] of profit or trust under the laws of this State or the United States." TEX. CONST. art. XVI, § 65.

Oddly, the provision applies to county court at law judges but not to other types of four-year judgeships. This distinction is one that even the justices who wrote the Judicial Code of Conduct seem to have overlooked.[2] The confusion makes sense. Unlike the U.S. Constitution— which is 4,543 words and fits in pocket-sized booklets—the Texas Constitution is the nation's second-longest, with more than 87,000 words and an ever-growing list of amendments on matters as obscure as livestock inspection. TEX. CONST. art. XVI, § 23. As a result, Justice Don Willett, formerly of the Texas Supreme Court and now a judge on the U.S. Fifth Circuit Court of Appeals, has described the Texas Constitution as "ungainly," "unwieldy," and "a top-to-bottom mess." *In re Reece*, 341 S.W.3d 360, 388 (Tex. 2011) (Willett, J., dissenting). The Texas Constitution is especially "convoluted" in its distinctions governing a "crazy-quilt court system" that is "one of the most complex in the United States, if not the world." *Id.* at 381.

The point is not that the Texas Constitution does not apply. Instead, the point is that skilled judges—even Supreme Court justices who write the Judicial Code of Conduct—sometime find themselves justifiably perplexed by arbitrary distinctions among the various types of courts that are a unique feature of Texas law. In many instances, such distinctions appear to operate as pointless traps for the unwary.

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[1] For example, Judge McLeod's Facebook page has long contained extensive disclaimers incorporating the text of Canon 5 (such as the fact that his appearance at certain events does not constitute an endorsement), confirming Judge McLeod's diligent efforts to follow the applicable campaign regulations.

[2] Canon 6(A)(1)(f) specifies that the Code of Judicial Conduct applies to judges of statutory county courts, such as Judge McLeod. The only judges exempt from Canon 5(3) are justices of the peace, municipal judges, and "County Judges" who perform judicial functions, i.e., the county executive judges who, in smaller counties, still decide probate cases and the like. TEX. CODE JUD. CONDUCT, Canon 6(B)(4); Canon 6(C); Canon 8(B)(16) (defining "County Judge" to mean the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution). For example, Chambers County Judge Jimmy Sylvia would be exempt from Canon 5(3) because, in addition to his judicial functions, he hears certain civil, probate, and juvenile lawsuits. *See id.* As a result, the Canon 6 exemptions do not apply to a County Court at Law Judge such as Judge McLeod; instead, Canon 5(3) applies to him.

2. Judge McLeod's words need not be construed as a resignation.

Judge McLeod's steps toward a future Supreme Court candidacy moved him toward a confusing gray area in Texas law but did not carry him beyond the point of no return. Some of the pertinent constitutional text specifies that:

> If any [Judges of the County Courts at Law] shall **announce their candidacy, or shall in fact become a candidate**, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

TEX. CONST. art. XVI, § 65(b) (emphasis added).

It is undisputed that Judge McLeod never "in fact bec[a]me a candidate" for Texas Supreme Court. To "become a candidate" for that position would require filing an application, 5,000 petition signatures, and a $3,750 fee with the chairperson of the Texas Democratic Party. TEX. ELEC. CODE §§ 172.022(a)(1); 172.024; 172.025(1); *see also* Op. Tex. Att'y Gen. No. JC-0249 (2000) ("[A]n officer 'in fact become[s] a candidate' by the act of applying for a place on the ballot."). Judge McLeod took none of those steps. Moreover, Judge McLeod could not possibly have "become a candidate" for Texas Supreme Court until at least November 9, 2019, which is the earliest available date to submit the required application, signatures, and fee. TEX. ELEC. CODE § 172.023.

Although Judge McLeod never became an actual candidate for Supreme Court, some contend that he "announce[d his] candidacy." In exploring a possible campaign, however, Judge McLeod only got as far as filing a treasurer appointment with the Texas Secretary of State. **Texas law expressly recognizes that filing a treasurer appointment "does not constitute candidacy or an announcement of candidacy for purposes of the automatic resignation provisions of Article XVI, Section 65."** TEX. ELEC. CODE § 251.001(1)(A).

Judge McLeod also had a website with the URL "mcleodforjustice.com." However, Judge McLeod has used that same URL for all campaigns—including for his current County Court at Law bench—since a 2016 run for Harris County **Justice** of the Peace.[3] To the extent Judge McLeod may have used his website to test preliminary, draft content discussing a possible Supreme Court campaign that could not have become official for another eight months, such writings need not be

[3] *See* DNS records showing that Judge McLeod registered "mcleodforjustice.com" on December 17, **2015**. https://whois.icann.org/en/lookup?name=mcleodforjustice.com.

construed as an unequivocal resignation. *See* Op. Tex. Att'y Gen. No. GA-0643 (2008) (declining to find automatic resignation despite constable's distribution of flier at political meeting that "expressed the desire to bring his 'leadership, values, and … experience' to the County Commissioners Court"). Nor did Judge McLeod resign by previewing a future campaign to friends who serve as Democratic precinct chairs. *Id.* (declining to find automatic resignation despite constable's speech at political gathering and despite TV report that constable was running for commissioner).

Judge McLeod's inconsequential steps toward a nascent, non-official campaign should not be considered in a vacuum. "Any constitutional or statutory provision which restricts the right to hold office must be strictly construed against ineligibility." *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992). Rather than scouring for technicalities to justify booting Judge McLeod from office, the legally sound approach is to examine all the facts in the light most favorable to him and to retain him in office unless no other conclusion is possible. *See id.*

Additionally, Article XVI, section 65 imposes no magic-words test. No court has ever simplified the inquiry to whether Judge McLeod uttered "abracadabra" or "candidate," and such a mechanical approach would be inconsistent with the constitution's purposes. As a result, "a person's statement concerning another office **must be viewed in context** to determine if it constitutes an **unqualified** announcement of candidacy for that office." Op. Tex. Att'y Gen. No. GA-0769 (2010) (emphasis added).

Quickly upon learning of others' contention that Article XVI, section 65 was at issue, Judge McLeod dispelled any legitimate confusion by (1) withdrawing his treasurer appointment and (2) definitively, publicly stating that he is not and will not become a candidate for Supreme Court. Because only an "unqualified announcement of candidacy" can lead to resignation, *id.*, it stands to reason that—when questions arise about whether an official's statements were "unqualified"—that official's own clarifications should be considered to assess his earlier statements in context.

When viewed in light of all the circumstances—especially Judge McLeod's near-immediate disclaimer of any intent to actually file candidacy papers—there is insufficient evidence that Judge McLeod committed to any "unqualified" declaration of candidacy. To the contrary, the evidence shows that Judge McLeod did ***not*** "become a candidate" for Supreme Court and, at most, made a few preliminary comments about a potential campaign that (a) could not have materialized until at least November 9, 2019 and (c) could not have even begun to seek donors until May 13, 2019. TEX. ELEC. CODE §§ 172.023; 253.153(1)(A).

3. If a resignation did occur, the constitutionally sound approach is for Judge McLeod to hold over in office through voters' next opportunity to review the matter in the 2020 election.

Even if there were sufficient evidence that Judge McLeod resigned, nothing requires the commissioners to intervene at this time. If a nominal vacancy exists, the commissioners may—but need not—appoint a replacement. TEX. GOV'T CODE § 25.2603. The only timing requirement is that a vacated judgeship must be put on the next general election ballot. *Id.* § 25.2603(b). During any nominal "vacancy" prior to the 2020 general election, the Texas Constitution enables Judge McLeod to continue serving even after the putative "resignation." TEX. CONST. art. XVI, § 17 ("[A]ll officers of this State shall continue to perform the duties of their offices until their successors shall be duly qualified.").

In another recent case, the Aransas County Attorney told commissioners that he was running for judge and that his county attorney position was thus vacant. *Bianchi v. State*, 444 S.W.3d 231, 247 (Tex. App.—Corpus Christi 2014, no pet.). Rather than appointing a new county attorney, the commissioners decided to let him keep performing as county attorney (even while, unlike Judge McLeod, still running for another office) until a special election the following year. In response to a *quo warranto* suit, the Court of Appeals affirmed the commissioners' right to let even this ***admittedly*** resigned official continue serving as provided by Article XVI, § 17 of the Texas Constitution. *Id.*

Putting Judge McLeod's bench back on the 2020 ballot would allow voters to decide the outcome of his inconsequential, technical mistake. Honoring Judge McLeod's continued service in the meantime would (1) be appropriately respectful to the will of the 647,502 Harris County voters who just elected him five months ago and (2) avoid further disruptions in the work of County Court at Law No. 4. This middle-ground approach would satisfy both applicable provisions of the Texas Constitution while empowering voters as the ultimate decisionmakers.

4. Denying Judge McLeod holdover status would conflict with the purposes of the relevant constitutional text.

Nothing in Article XVI, section 65 states that Judge McLeod cannot revoke or clarify his comments about seeking another position. Instead, the constitution is silent about that issue. Likewise, the constitution leaves the commissioners with discretion about whether to (1) appoint a replacement or (2) maintain the status quo, in which Judge McLeod holds over until voters weigh in. With no controlling text, the purposes behind the relevant constitutional provisions become paramount.

The purpose of Article XVI, section 65 (the resign-to-run law) is to "prevent the officer from holding the office during candidacy for another office," not to

punish officeholders for technical mistakes. *See* Op. Tex. Att'y Gen. No. WW-788 (1960). Additionally, section 65 requires special elections to fill vacant posts, which reflects the constitutional policy of minimizing the time that elective offices may be filled by unelected appointees. TEX. CONST. art. XVI, § 65(b). Finally, the purpose of Article XVI, section 17 (the holdover provision) is "to ensure against vacancies in office, to preserve the orderly processes of government, and to promote continuity in the functioning of government." *Bianchi*, 444 S.W.3d at 245.

As in any legal context, another vital factor is whether any damage resulted.[4] When purely technical errors occur, Texas law generally affords no remedy unless someone suffered material harm.[5] Additionally, the law "abhors a forfeiture," and errors of form rather than substance should not lead to harsh results.[6] Denying holdover status for Judge McLeod would conflict with all of these principles.

Judge McLeod has clarified that he is not pursuing another office, and he took only immaterial steps toward a potential campaign during his off hours when he, for instance, edited a web site or attended a Saturday political meeting. As a result, section 65's purpose has been honored here. The conceptual Supreme Court campaign did not and will not detract from Judge McLeod's time on the county bench. No one has identified any harm to the most important stakeholders, the parties who appear before Judge McLeod in court.

To the contrary, Judge McLeod has presided over **14 jury trials** in his first three months as judge of County Civil Court at Law No. 4—compared to just 10 jury trials in that same court over the entire *two years* before Judge McLeod took office. He has also moved along or resolved 1,400 cases that did not even have a setting on the docket when he assumed the bench. At minimum, the lack of substantive harm and the purely technical nature of the alleged error should weigh heavily in favor of Judge McLeod's holdover status.

In contrast, removing Judge McLeod and appointing a replacement would contradict the purposes of both section 17 and section 65. First, this action would unnecessarily replace an elected official with an appointed one, conflicting with the constitution's preference for voter-approved officials. Second, replacing Judge McLeod would disrupt the order and continuity of County Civil Court at Law No. 4 by, among other ways, requiring a new appointee to (a) complete judge training

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[4] *E.g.*, *Riley v. Kennedy*, 553 U.S. 406, 434 (2008) (Stevens, J., dissenting) (recounting an earlier Supreme Court decision that found "no harm, no foul" because an improper election practice was only in effect for a few weeks and officials "rectified the situation" before it hurt anyone).

[5] *E.g.*, *Hoyt v. Geist*, 364 S.W.2d 461, 464 (Tex. Civ. App.—Houston 1963, no writ) (declining to impose injunction despite "technical" breach of restrictive covenant).

[6] *Cf. Sirtex Oil Indus., Inc. v. Erigan*, 403 S.W.2d 784, 788 (Tex. 1966) ("To overlook something, however, does not call for punitive treatment . . . .").

school, (b) start from scratch the learning curve that Judge McLeod already surmounted, (c) potentially re-staff the office, and (d) redo the policies and procedures that Judge McLeod has developed and that practitioners in his court are already becoming accustomed to.

In sum, recognizing Judge McLeod's holdover status and then letting the voters decide in 2020 would be undisputedly legal under the Texas Constitution and the outcome most constituent with the purposes of the relevant constitutional text.

Conclusion

For the reasons above, we the undersigned attorneys respectfully ask that the Commissioners' Court vote against any efforts to remove or replace Hon. William "Bill" McLeod.

Sincerely,

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